JOBNAME: No Job Name PAGE: 1 SESS: 3 OUTPUT: Fri Nov 21 14:57:00 2014

Loh Yoon Fatt v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–333–12 OF 2011
AZAHAR MOHAMED, ROHANA YUSUF AND HAMID SULTAN JJCA
6 MAY 2014

Criminal Law — Murder — Causation — Whether injury caused by accused substantial and operating cause of victim's death — Whether alleged mismanagement of victim in hospital following attack by accused not real cause of death — Whether defence of grave and sudden provocation acceptable

A dinner outing by two families to a restaurant ended in tragedy when a member of one of the families caused the death of a member of the other following an argument over a parking incident. The deceased, his wife (PW3), their daughter (PW7) and another child had come out of the restaurant after their dinner to find their car blocked by the appellant's car. After sounding his car horn several times and not getting a response, the deceased went into the restaurant to look for the owner of the other car, without success. After waiting for some time, the deceased got annoyed and kicked the appellant's car causing it some damage. Later, on coming out of the restaurant and finding that the deceased had damaged his car, the appellant demanded that the deceased compensate him for the damage. The deceased ignored the appellant. The appellant then went to his car to get a metal steering lock and returned to hit the deceased on the back of his head with it. The deceased was rushed to hospital where two urgent surgeries, one following the other, were done on his head. The deceased became brain-dead following the operations and died a few days later. The High Court found the appellant guilty of causing the deceased's murder and sentenced him to death. The conviction was largely based on the mutually corroborative eye witness testimonies of PW3, PW7 and the boyfriend (PW10) of the appellant's younger sister. The trial judge found the three to be truthful witnesses and based on their evidence rejected the appellant's defence that his blow to the deceased's head was accidental. Despite the pathologist's testimony at the trial that the blow to the deceased's head was fatal, the appellant in his instant appeal against conviction and sentence argued that the blow itself, which caused a fracture of the skull, did not kill the deceased but that it was the bleeding in and swelling of the brain following the two surgeries at the hospital which directly caused the death and that therefore the appellant should only be found guilty of culpable homicide not amounting to murder. The appellant also contended that the trial judge did not sufficiently consider his defence of grave and sudden provocation.

Held, dismissing the appeal and affirming the conviction and sentence:

JOBNAME: No Job Name PAGE: 2 SESS: 3 OUTPUT: Fri Nov 21 14:57:00 2014

(1) There was no doubt the appellant deliberately took the metal steering lock from his car and hit it with a 'mighty force' on the deceased's head from behind resulting in the fracture of the skull and smearing of the brain. The pathologist had testified that the head injury was fatal. The trial judge had addressed himself on the various limbs of the provisions of s 300 of the Penal Code to determine if the appellant's act fell within the offence of murder. He concluded in no uncertain terms that the injuries caused were sufficient in the ordinary cause of nature to cause death (see paras 10, 12, 14 & 15).

(2) The appeal records showed there was more than sufficient admissible evidence to support the trial judge's finding that the head injury caused by the appellant was the substantial and operating cause of the deceased's death. The causal connection between the appellant's act and the deceased's death was direct and distinct and was not broken by the intervention of subsequent causes such as the alleged mismanagement of the deceased in hospital (see para 20).

(3) The trial judge directed himself correctly with respect to the defence of 'grave and sudden provocation' and correctly held that the appellant was not protected under Exception 1 to s 300 of the Penal Code. The trial judge held that although there was some provocation from the deceased, it was not grave and sudden enough to have deprived a reasonable man of his self-control; that there was a cooling off period between the time the deceased kicked the appellant's car and the time the appellant took out the steering lock from his car; and that the appellant's retaliation was not commensurate with the degree of provocation from the deceased who was an elderly man and unarmed at the time (see paras 24 & 25).

[Bahasa Malaysia summary

Makan malam dua keluarga berakhir dengan tragedi apabila seorang ahli daripada salah satu keluarga menyebabkan kematian kepada seorang ahli keluarga lagi satu berikutan suatu pergaduhan berkenaan insiden tempat letak kereta. Si mati, isterinya (PW3), anak perempuannya (PW7) dan soerang lagi anaknya telah keluar daripada restauran selepas meraka makan malam dan mendapati kereta mereka dihalang oleh kereta perayu. Setelah membunyikan hon beberapa kali dan tidak mendapat tindak balas, si mati masuk ke dalam restoran untuk mencari pemilik kereta itu, tetapi tidak berjaya. Setelah menunggu untuk beberapa lama, si mati menjadi marah dan menendang kereta perayu mengakibatkan kerosakan. Selepas itu, apabila keluar dari restaurant dan mendapati si mati telah merosakkan keretanya, perayu menuntut agar si mati membayar pampasan kepadanya untuk kerosakan. Si mati mengabaikan perayu. Perayu kemudian pergi ke keretanya untuk mengambil kunci stereng besi dan kembali dan memukul si mati di belakang kepala dengan menggunakannya. Si mati digegaskan ke hospital yang mana dua pembedahan kritikal, satu mengikuti yang lain, telah dilakukan di

JOBNAME: No Job Name PAGE: 3 SESS: 3 OUTPUT: Fri Nov 21 14:57:00 2014

kepalanya. Si mati didapati mati otak berikutan pembedahan-pembedahan dan meninggal dunia beberapa hari kemudian. Mahkamah Tinggi mendapati perayu bersalah menyebabkan kematian si mati dan dijatuhkan hukuman mati ke atasnya. Sabitan itu sebahagian besarnya berdasarkan sokongan testimoni saksi PW3, PW7 dan teman lelaki adik perempuan perayu (PW10). Hakim perbicaraan mendapati ketiga-tiga adalah saksi yang benar dan berdasarkan keterangan mereka menolak pembelaan perayu bahawa pukulan di kepala si mati adalah tidak disengajakan. Walaupun testimoni pakar patologi sewaktu perbicaraan bahawa pukulan di kepala si mati adalah fatal, perayu dalam rayuannya terhadap sabitan dan hukuman berhujah bahawa pukulan itu, yang mana menyebabkan keretakan tengkorak, tidak membunuh si mati tetapi bahawa ia adalah pendarahan dan bengkak di otak berikutan dua pembedahan di hospital yang secara langsung menyebabkan kematian dan bahawa oleh itu perayu sepatutnya didapati bersalah untuk homisid salah yang bukan pembunuhan. Perayu juga menegaskan bahawa hakim perbicaraan tidak dengan secukupnya menilai pembelaannya bangkitan marah besar dan mengejut.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Tiada kesangsian perayu dengan sengaja mengambil kunci stereng besi daripada keretanya dan memukul dengan 'mighty force' di kepala si mati daripada belakang mengakibatkan keretakan tengkorak dan pelumuran otak. Pakar patologi telah memberi keterangan bahawa kecederaan di kepala adalah fatal. Hakim perbicaraan telah mempertimbangkan dengan sendiri beberapa bahagian proviso s 300 Kanun Keseksaan untuk menentukan jika tindakan perayu terangkum dalam kesalahan membunuh. Beliau menyimpulkan dalam tiada terma yang samar-samar bahawa kecederaan-kecederaan yang disebabkan adalah cukup dalam keadaan biasa untuk menyebabkan kematian (lihat perenggan 10, 12 14 & 15).

(2) Rekod rayuan menunjukkan terdapat lebih daripada keterangan boleh terima untuk menyokong dapatan hakim perbicaraan bahawa kecederaan kepala yang disebabkan oleh perayu adalah penyebab substansial dan operasional kematian si mati. Kaitan sebab akibat antara perbuatan perayu dan kematian si mati adalah secara langsung dan nyata dan tidak terputus oleh campur tangan sebab-sebab berikutnya seperti salah urus si mati yang didakwa di hospital (lihat perenggan 20).

(3) Hakim perbicaraan mengarahkan dirinya betul berkenaan dengan pertahanan 'grave and sudden provocation' dan dengan betul memutuskan bahawa perayu tidak dilindungi di bawah Pengecualian 1 s 300 Kanun Keseksaan. Hakim perbicaraan memutuskan bahawa walaupun terdapat sedikit provokasi daripada si mati, ia tidak cukup besar dan secara tiba-tiba telah menyebabkan seorang lelaki yang

JOBNAME: No Job Name PAGE: 4 SESS: 3 OUTPUT: Fri Nov 21 14:57:00 2014

munasabah kehilangan kawalan dirinya; bahawa terdapat tempoh bertenang antara masa si mati menendang kereta perayu dan masa perayu mengambil keluar kunci stereng dari keretanya; dan bahawa tindakan balas perayu tidak setimpal dengan tahap provokasi daripada si mati yang merupakan seorang lelaki tua dan tidak bersenjata pada masa itu (lihat perenggan 24 & 25).]

Notes

For cases on causation, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1560–1563.

Cases referred to

Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)
Cheong Kam Kuen v PP [2013] 1 MLJ 15; [2012] 8 CLJ 537, FC (refd)
Leong Siong Sun & Anor v PP [1985] CLJ (Rep) 523, HC (refd)
R v Smith [1959] 2 All ER 193 (refd)

Legislation referred to

Penal Code ss 300, 300 Exception 1, 302, 304
Criminal Procedure Code s 180(3)

Appeal from: Criminal Trial No 45B-4 of 2010 (High Court, Ipoh)

Gobind Singh Deo (Gobind Singh Deo & Co) for the appellant.
Mangaiarkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] The appellant Loh Yoon Fatt was tried in the High Court at Ipoh for murdering one Lam Siew Keong ('the deceased') on the following charge under s 302 of the Penal Code:

Bahawa kamu pada 25.12.2009 jam lebih kurang 9.20 malam di tempat letak kenderaan di Restoran Oversea, Jalan Sultan Abdul Jalil, Ipoh, Perak, dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, telah melakukan pembunuhan dengan menyebabkan kematian ke atas Lam Siew Keong, No. KPT: 510715-08-5889 dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] The High Court found the appellant guilty on the charge and sentenced him to death. The appellant appealed to this court against that decision.

[3] Three eyewitnesses testified that it was the appellant who hit the deceased

JOBNAME: No Job Name PAGE: 5 SESS: 3 OUTPUT: Fri Nov 21 14:57:00 2014

on his head with a metal steering lock. The pathologist who conducted the post mortem on the deceased certified that the cause of death was as a result of severe head injury due to blunt trauma to the head.

[4] The facts adduced by the prosecution at the trial are well summarised by the learned trial judge in his judgment as follows:

> The whole episode started with the two families, that is, the deceased's family and the accused's family eating Christmas dinners in the Oversea Restaurant.
>
> Having eaten the dinner, the deceased, his wife and his two children came out of the restaurant and found that their car which was parked right in front of the restaurant was blocked by the accused's car. The deceased then honked his car for a few times and when the car owner did not come out of the restaurant, the deceased then went in and out of the restaurant looking for the car owner.
>
> After waiting for about 10 minutes, the deceased got annoyed and went and kicked the accused's car. Later when the accused came out from the restaurant, he was told that someone was kicking his car. He was then rushing to look at his car. He asked the man standing at the stairs 'who damaged my car?' That man told the accused that it was the deceased who kicked his car.
>
> He then shouted at the deceased in Cantonese 'who damaged my car?' There was some argument between the deceased and the accused.
>
> The accused was seen turning around and walking to the driver's seat of his car. The accused was then seen at the back of the deceased raising his hand with a metal rod and hitting the deceased's head from behind. The deceased collapsed and was subsequently sent to Ipoh Hospital. The deceased died a few days later at the Ipoh Hospital.

[5] On the basis of the evidence mentioned above, the learned trial judge came to the finding that the prosecution had made out a prima facie case against the appellant under s 180(3) of the Criminal Procedure Code and therefore called upon the appellant to enter on his defence in respect of the offence charged.

[6] The appellant elected to give evidence on oath. In his defence, the appellant said that he had no intention to hit the deceased's head with a steering lock and that the injury caused was purely accidental. He said the purpose of taking out the steering lock was to protect members of his family from being hurt and to threaten the deceased in order to stop him from damaging his car. According to the appellant, while he confronted the deceased with the steering lock, the deceased pushed him with one hand and held the appellant's other hand which was holding the steering lock. The appellant said he went backward slightly and swung his hand which was holding the steering lock towards the deceased's head and the steering lock had accidently hit the rear right side of the deceased's head.

JOBNAME: No Job Name PAGE: 6 SESS: 3 OUTPUT: Fri Nov 21 14:57:00 2014

[7] At the end of the trial, the learned trial judge dismissed the defence presented by the appellant and found that the prosecution had proved beyond reasonable doubt the charge of murder under s 302 of the Penal Code against the appellant.

[8] Before us, learned counsel for the appellant argued that on the available evidence, taken at its highest, the prosecution could only prove the offence of culpable homicide not amounting to murder under s 304 of the Penal Code against the appellant. Learned counsel submitted that the learned trial judge correctly identified the injury caused by the appellant upon the deceased as a hit on the back of his head. However, learned counsel argued that the learned trial judge failed to consider that the injury itself was not fatal. What was fatal according to learned counsel was the subsequent 'hemorrhage and the swelling of the brain'. It was argued that the hemorrhage and swelling which resulted in the death of the deceased was not caused by the hit to the back of his head alone but some other intervening act. Learned counsel then took us through the evidence of Dr Sutharshan a/l Solkalingam ('PW8') which can be summarised:

(a) the deceased was brought into Hospital Ipoh at 10pm on 25 December 2009;

(b) PW8 met the deceased at about 12.15am and he noted the deceased was drowsy, had been vomiting and had bleeding from the right side of the head;

(c) a CT scan was done which revealed that the deceased had bleeding on the right side and also the left side of the brain;

(d) an operation was carried out by PW8 who was only a medical officer at the hospital, on the deceased at 1.45am, ending at 3am. This operation was carried out on the right side of the head only;

(e) after that operation, the deceased was sent to the ICU and it was noted that the deceased's left side of the brain was bleeding, expanding and compressing the brain;

(f) it is only after this that PW8 proceeded to carry out a second operation on the deceased at 4.30am; and

(g) it was after the two operation that PW8 said the deceased became brain dead.

[9] Relying on the above narration, learned counsel argued that this was a clear case where the hemorrhaging and swelling to the brain was compounded by the mismanagement of PW8. As we have alluded to earlier, the argument by learned counsel for the appellant was that the injury to the head caused by the appellant was the fracture of skull which was not fatal. It was the subsequent swelling of the brain and hemorrhage which caused death.

JOBNAME: No Job Name PAGE: 7 SESS: 3 OUTPUT: Fri Nov 21 14:57:00 2014

[10] In the first place, there can be no doubt that the appellant deliberately took the metal steering lock from the driver's sit and hit it viciously and cruelly on the deceased's head from behind. The wife of the deceased, Ng Chooi Mei ('PW3') is an eyewitness to the incident that happened on the fateful night. In this regard, the material part of the evidence of PW3 is as follows:

> After finishing our dinner, my husband, my daughter, my son and myself went out of the restaurant and entered our car which was parked just outside the restaurant. We entered the car at the same time. My husband was seated at the driver seat. I was seated beside him in the front passenger seat. My daughter was seated right behind me and my son was seated right behind my husband. There was a black car blocking our car in front. My husband pressed on the honk a few times. The car owner did not come out from the restaurant. Nobody was in the black car. After waiting for a while, my husband went back to the restaurant to inform the car owner. I saw my husband coming in and out of the restaurant looking for the car owner.
>
> After waiting for more than 10 minutes, my husband got annoyed. He went and kicked the black car. Later the car owner came out from the restaurant. He was seen talking to another man standing by the stairs outside the restaurant. He asked my husband to pay damages for his car. My husband just kept quiet and ignored him. The car owner turned and got back to the driver side of the car. Then I turned around and talked to my children. When I looked back, I saw the car owner right behind my husband. He was holding a steel rod. I saw him attack my husband from the back. My husband fell down. I rushed out of my car to help my husband.
>
> I shouted to my daughter to call the police and the ambulance. Then I helped my husband to get up and asked him to sit on the stairs.
>
> Later my husband wanted to get back to the driver seat of our car, so I helped him. After I helped my husband to get into our car, the car owner smashed the window of the front passenger seat. The glass window shattered. Then he hit the front bonnet of our car a few times with the steel rod. Later he left and the police came.

[11] PW3's evidence is corroborated by the evidence of two other eyewitnesses, the deceased's daughter, Lam Po Yee ('PW7') and Ooi Choon Keat ('PW10'), the boyfriend of the appellant's younger sister. In relation to this, the learned trial judge, after a careful review of the evidence, made specific finding that PW3, PW7 and PW10 are witnesses of truth. Thus the defence version to the effect that the injury caused was purely accidental was totally unacceptable to the learned trial judge. In the words of the learned trial judge:

> I find that the defence version pertaining to the deceased continuing scratching and kicking his car, the taking out of a steering lock by the accused to threaten the deceased to stop him from kicking his car, the scuffle and pushing of one another resulting in the accused accidentally hitting the deceased's head with the steering lock he was holding was in complete contradiction to the prosecution version given by SP3, SP7 and SP10. None of them had told the court about the scuffle or the pushing incident. I find that SP3, SP7 and SP10 are witnesses of truth. Their versions are consistent. I see no reasons not to accept their version. For this reason,

JOBNAME: No Job Name PAGE: 8 SESS: 3 OUTPUT: Fri Nov 21 14:57:00 2014

> I find the accused's version not believable. Having considered the defence vis-a-vis the evidence adduced by the prosecution in totality, I find that the defence has also failed to create any reasonable doubt in the prosecution case.

[12] From the nature of the head injury sustained by the deceased, where his skull was fractured and his brain smeared, we agreed with the submission of the learned deputy public prosecutor that the only reasonable conclusion to be reached is that the appellant had used a 'mighty force' when he struck the steering lock on the head of the deceased.

[13] In the case of *Cheong Kam Kuen v Public Prosecutor* [2013] 1 MLJ 15; [2012] 8 CLJ 537 Zulkefli Makinudin CJ (Malaya) in delivering the judgment of the Federal Court said:

> Section 300 of the Penal Code defines murder as follows: Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

[14] In his judgment, the learned trial judge did address himself on the various limbs of the provisions of s 300 of the Penal Code to determine whether the offence committed by the appellant falls within the offence of murder under s 302 of the Penal Code. This is the conclusion of the learned trial judge:

> From the medical evidence adduced through SP13, I am satisfied in no uncertain terms that injuries caused were sufficient in the ordinary cause of nature to cause death. I therefore find that the prosecution has proved cl (c) of s 300 of the Penal Code.

[15] On the argument of learned counsel to the effect that the injury caused by the appellant in itself ie fracture to the skull, was not fatal, the consultant forensic pathologist, Dato' Dr Bhupinder Singh ('PW13') testified that the cause of the deceased's death was severe head injury due to blunt trauma to the head. The material part of his evidence is as follows:

> Any blunt weapon which could be heavy in nature could have resulted in such injuries.
>
> Timbalan Pendakwa Raya:
>
> Is one blow of such blunt weapon sufficient to cause such injury?
>
> SP13 — Yes it is possible.

JOBNAME: No Job Name PAGE: 9 SESS: 3 OUTPUT: Fri Nov 21 14:57:00 2014

A I would not be able to say how deep the head injury is because this is not a penetrating wound.

The head injury sustained by the deceased was fatal. From looking at the smearing of the brain, hemorrhage and the factures as seen over the scalp surface were severe enough to cause death.

B

If immediate medical intervention is available, with proper intensive care management, chances of survival are possible.

Chances of survival differ in different people because it depends on the type of bad injury, the type of damage and also if there are any predisposing medical problems.

C

I do not think operations conducted in this particular case would have resulted in the death of the individual.

There were no injuries seen on the deceased other than the head injuries. The deceased would survive if immediate medical intervention is available with proper

D intensive care management.

[16] On the issue of break in the chain of causation, the leading authority on this area of law is the English case of *R v Smith* [1959] 2 All ER 193, where Lord Parker CJ held that:

E

... It seems to the court that, if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause

F operates can it be said that the death does not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that death does not flow from the wound ...

G **[17]** In *Leong Siong Sun & Anor v Public Prosecutor* [1985] CLJ (Rep) 523, Peh Swee Chin J (as he then was) applied the principle enunciated in *R v Smith*. In that case, the two accused persons were convicted under s 304 of the Penal Code for having caused the death of one Kim Yong with the intention of causing such bodily injuries as was likely to cause death. The medical evidence

H showed that the deceased died of rupture of the intestine with peritonitis. They were convicted by the sessions court. On appeal, it was argued that the death was not caused by the rupture inflicted by the accused persons but by the failure for the deceased to be treated properly and the deceased's own negligence in discharging himself thereby foregoing the required operation. The medical

I testimony showed that if treated adequately and on time, the rupture would not have been fatal. In such circumstances the issue raised was whether the accused persons could be convicted under s 304 instead of having merely caused grievous bodily harm. Peh Swee Chin J (as he then was) in applying the principle propounded in *R v Smith* held that:

JOBNAME: No Job Name PAGE: 10 SESS: 3 OUTPUT: Fri Nov 21 14:57:00 2014

> ... Here in this case I am unable to say that the rupture of the intestine was not the operating and substantial cause of death, neither am I able to say that the failure to operate on the deceased was so overwhelming a cause of death as to make the rupture of the intestine merely a part of the history.
>
> I therefore decline to accept counsel's submission on this and having regard to what has been stated on the other findings of the learned President, I would dismiss the appeal and confirm the convictions recorded and sentences passed by him ...

[18] Coming back to the present case, the argument raised by learned counsel that the injury caused by the appellant was not fatal and that it was the subsequent swelling of the brain and hemorrhage which caused death had been addressed by the learned trial judge as follows:

> Who caused the damage that subsequently led to the hemorrhage and swelling of the brain? Is it the hospital treatment by SP8's negligence on his part that had led to the damage that had subsequently led to the death of the deceased?
>
> The issue for determination is whether the medical treatment even if negligent is capable of breaking the chain of causation linking the accused's unlawful act with the ensuing criminal harm (death).
>
> The test should be:
>
> Whether the initial wound (injury) is continuing to be a substantial and operative cause, rather than whether there happened to be a significant contributory cause. Sheer incompetence on the part of the medical staff does not break the chain of causation if the initial wound caused by the accused was still the substantial and operative cause: see *Leong Siong Sun & Anor v Public Prosecutor* [1985] CLJ (Rep) 523 and *R v Smith* [1959] 2 All ER 193.

[19] In the later part of his judgment, the learned trial judge concluded:

> Based on the above evidence, I am satisfied that the initial wound that is the head injuries caused by the accused was still the substantial and operative cause.

[20] In our judgment, the finding of the learned trial judge that the head injury caused by the act of the appellant was the substantial and operative cause was decided wholly on the facts and the prevailing circumstances of the case as a whole, based on the credibility of the witnesses and the inherent probabilities of their testimonies. In our judgment, on consideration of the evidence as contained in the appeal records, there was more than sufficient admissible evidence to support the learned trial judge's findings. Irrefutably, from the evidence of PW3, PW7 and PW10, the head injury sustained by the deceased was caused by the savage act of the appellant and not from other causes. More importantly, it is clear from the expert evidence of PW13 that the cause of death was the head injury due to blunt object and that one blow of such blunt weapon was sufficient to cause such injuries. The head injury sustained by the deceased was fatal. On the facts of the present case, there can be no doubt that

JOBNAME: No Job Name PAGE: 11 SESS: 3 OUTPUT: Fri Nov 21 14:57:00 2014

the appellant's conduct in hitting the deceased head with a steering lock was an operating and substantial cause of death. The causal connection between the act of the appellant and the death of the deceased was direct and distinct. Even though the causal connection was not immediate, the connection is not broken by the intervention of subsequent causes. Based on the evidence, the original injury caused by the appellant was the continuing cause of death of the deceased. The alleged mismanagement of PW8 did not break the chain of causation between the injury caused by the appellant and the death of the deceased. The fatal injury sustained by the deceased as a consequence of the act of the appellant was still an operating or substantial cause of death. The appellant must be held liable for his act. We are therefore of the view that there has been no misdirection by the learned trial judge on this finding of fact.

[21] Finally, we now turn to the alternative submission raised by learned counsel for the appellant. It was argued that the learned trial judge failed to adequately consider the defence of provocation raised by the appellant. Learned counsel argued that the deceased had parked his car at a place where he was not supposed to park and he started damaging the appellant's car after the appellant failed to show up after a while. This infuriated the appellant who also demanded that the deceased pay for the damage caused but he refused. This, which happened quickly would have compounded an already tense situation resulting in the assault. Against this background, learned counsel submitted that the learned trial judge misdirected himself when he failed to appreciate that on the facts of this case, the deceased had in fact, looking at what he did cumulatively, provoked the appellant. Such provocation according to learned counsel was sufficient to bring the case under s 304 of the Penal Code instead.

[22] On consideration of the entire evidence and the material available on the appeal records, we found that the complaint of learned counsel lacked merit. Exception 1 of s 300 of the Penal Code provides that culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, caused the death of the person who gave the provocation, or causes the death of any other person by mistake or accident. This exception provides for the defence of grave and sudden provocation relied on by the appellant in the present case. The exception is subject to the following provisos:

(a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;

(b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant; and

(c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.

JOBNAME: No Job Name PAGE: 12 SESS: 3 OUTPUT: Fri Nov 21 14:57:00 2014

[23] The law on grave and sudden provocation had been explained by the Federal Court in *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281 where Nik Hashim FCJ in delivering the judgment of the court said:

> Thus, in order to successfully set up provocation as a defence for the reduction of the offence of murder to one of culpable homicide not amounting to murder, it is not enough to show that the accused was provoked into losing his self-control; it must be shown that the provocation was grave and sudden and must have by its gravity and suddenness caused a reasonable man to lose his self-control and induced him to do the act which caused the death of the deceased. In determining that question the court may also consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of the provocation.

[24] In the present case, the learned trial judge has given his most anxious consideration on the defence of 'grave and sudden provocation' raised by the appellant. The learned trial judge made an important observation by saying:

> Applying the law on grave and sudden provocation to our case, I find that Exception 1 to s 300 cannot be invoked by the defence for the following reasons:
>
> (i) It is not disputed that there was some provocation on the part of the deceased, but they were not grave and sudden enough to deprive a reasonable man of his self-control.
>
> (ii) The retaliation by the accused was clearly not commensurate with the degree of provocation given by the deceased.
>
> The only 'provocative acts' proven were that the deceased kicked the accused's car, then followed by some quarrel and the deceased refused to pay damages when asked to do so, and such 'provocative acts' by the deceased who was an elderly man and without holding any weapon in his hand would not justify the accused hitting the deceased's head with a steering lock.
>
> (iii) There was a cooling off period between the time the deceased was kicking the accused's car and the time accused was taking out a steering lock from his driver's seat.

[25] In our judgment, the passage above makes it patently clear that nothing more may fairly be expected of the learned trial judge on this issue. On the facts of the present case, the learned trial judge had directed himself correctly upon this aspect of law, which direction is in line with the approach indicated in the case of *Che Omar bin Mohd Akhir v Public Prosecutor*. We agree with the learned trial judge that the appellant cannot be protected under Exception 1 to s 300 of the Penal Code. The learned trial judge was entitled and correct in making such a finding.

[26] For all these reasons, the appeal was therefore dismissed. We found the

JOBNAME: No Job Name PAGE: 13 SESS: 3 OUTPUT: Fri Nov 21 14:57:00 2014

A conviction of the appellant was safe. We accordingly affirmed the conviction and the death sentence made by the learned trial judge.

Appeal dismissed and conviction and sentence affirmed.

B Reported by Ashok Kumar

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